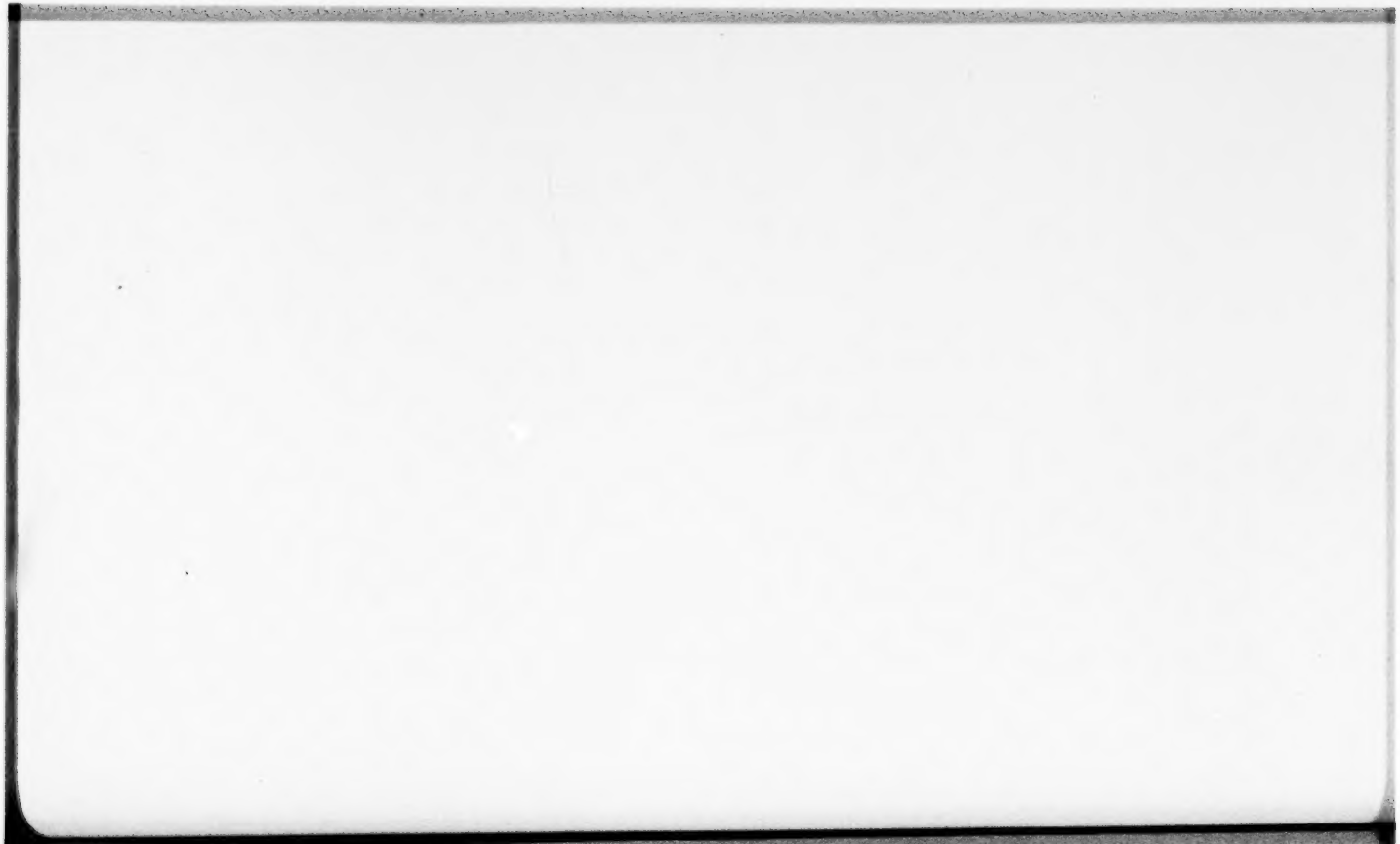


FILED
JAN 26 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 723

EMANUEL MAX COHEN AND ALBERT CHARLES SCHNEE,

Petitioners,

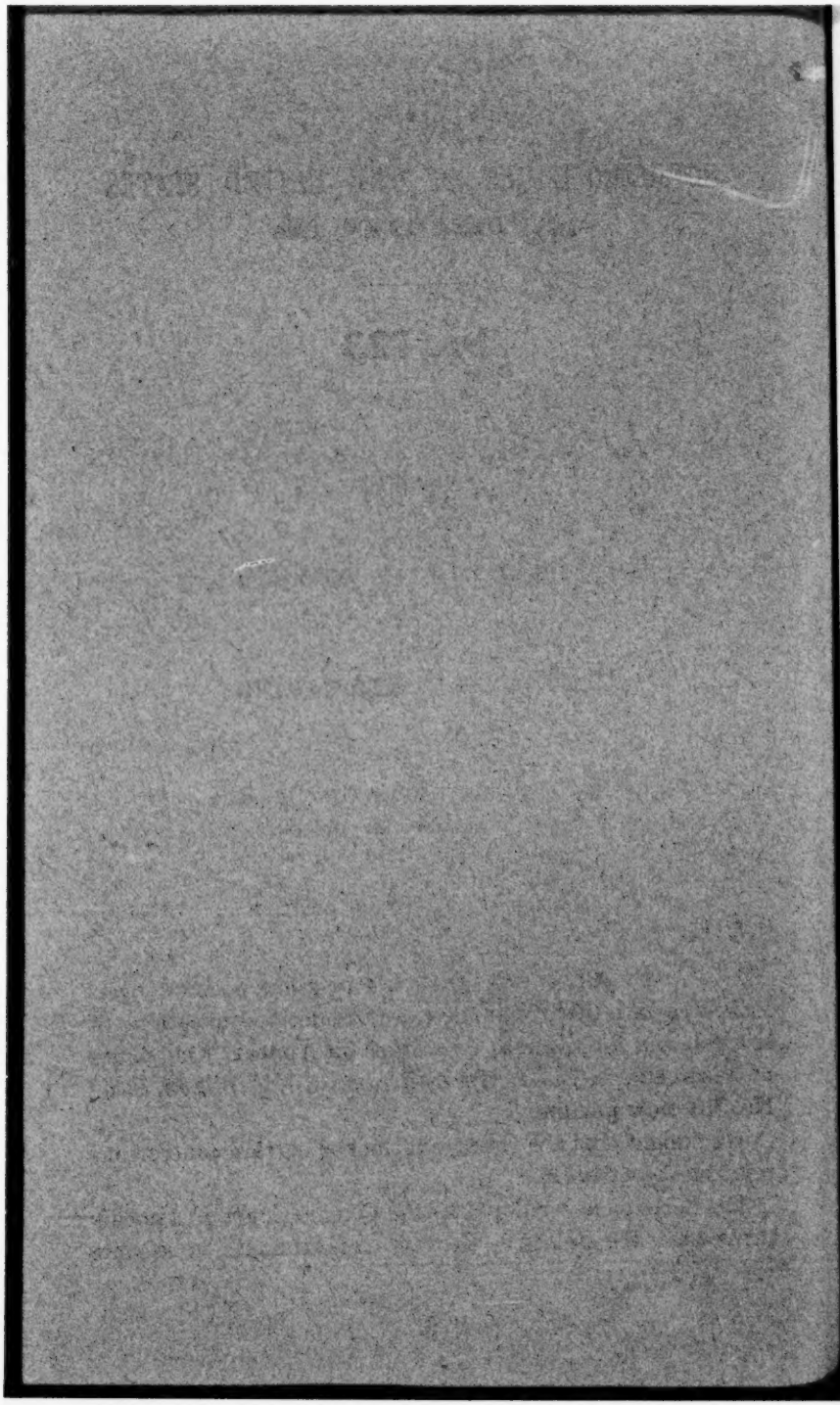
vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

MORRIS LAVINE,
Counsel for Petitioners.



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PETITION FOR REHEARING

To the Honorable Harlan F. Stone, Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners most respectfully petition for rehearing and respectfully represent as follows:

This court in passing upon the original petition overlooked certain new, important, and undecided questions of law relating to Criminal Procedure on Appeal. One phase of it is similar to that in *Harry Bridges* v. *I. F. Wixon, et al.*, No. 788, now pending.

We submit that the ruling overlooked certain concessions relating to petitioners.

The decision as rendered by the Circuit Court of Appeals turns back the Selective Service and attempts to assume

jurisdiction after turning it over to the military authorities, and is therefore contrary to this court's views in previous military case decisions and the law as established by Congress.

Certain concessions of the government in its brief in opposition should be reconsidered.

I

When the case was submitted to the jury in the District Court, the Regulations and Directives which respondent argued were not submitted to the trial court or jury.

Following the conviction, the Circuit Court of Appeals on May 19, 1944 reversed the conviction, on the ground that petitioner Cohen's official duties as government appeal agent did not include authority to recommend an extension or furlough for a registrant already inducted into the army (Pet. 41-50).

The Government thereafter petitioned for rehearing, inserting into its petition directives and local memorandum of the Selective service.

These memoranda appear for the first time in the government's petition for rehearing. THEY FORM THE BASIS OF THE COURT'S LATER DECISION, AFFIRMING THE JUDGMENT AND FROM WHICH DECISION THIS WRIT IS SOUGHT. They are incorporated in the decision.

The Circuit Court thereupon granted the petition for rehearing (R. 384-385) and on September 29, 1944, affirmed the judgment *without actually holding any hearing*, or giving defense counsel a chance to appear and reargue the case.

It is respectfully submitted that this case involves an important question of appellate court procedure in respect to: (1) Taking new evidence of Memoranda on appeal; (2)

granting rehearings; (3) deciding those cases without oral Argument.

This Court has granted rehearings in cases, but so far as petitioner knows, has always set them down for rehearing before the entire court, for reargument and rebriefing. It has not arbitrarily granted a rehearing upon new evidence presented to it and then arbitrarily reversed the case without hearing the other side.

We do not believe this procedure should be permitted to go unchallenged in appellate practice. A similar practice seems to have taken place in the *Harry Bridges* case No. 788 this term, the petitioner's petition for hearing in this Honorable Court discloses as follows:

> "A petition for a rehearing was filed July 26, 1944. It was principally addressed to the views expressed by the majority concerning their review of the evidence. The petition was denied in an opinion by Judge Stephens dated September 27, 1941 (R. 7811-2). Thereafter, and on November 1, 1944, Judge Stephens without further application by counsel amended the text of his opinion on rehearing."

In the case at bar, a determination by the jury and court required it to consider Local Board Memorandum and practice. None of these presented on rehearing were given to the trial court. Counsel for the defendant had no opportunity to cross-examine the witnesses and find out if there were other memorandum or regulations since that date which might change or alter the authority or legally affect the situation.

Such practice, we submit, has been forbidden by this Honorable Court in the case of *Edwards* v. *U. S.*, 312 U. S. 473, 85 L. Ed. 957. In Edwards versus the U. S. the Supreme Court has said that pursuant to rules VIII and IX of Rules on Appeal, it is fundamental that a case be deter-

mined on evidence given in Court through witnesses. Nothing less is permitted.

However, in the case at bar, no witnesses testified to any memorandum regarding the selective service and none was offered in evidence in the trial. No witness was put on the witness stand and only after the case had been decided on appeal and reversed did the government come in with Memorandum of local draft boards and other data regarding procedure which had made their way before the Circuit Court of Appeals and this Honorable Court. The government made point of this data and so did the Circuit Court of Appeals in reaching its decision. We respectfully submit that this is erroneous procedure. It might be that if a witness was put on the witness stand no additional regulations, memoranda nor procedure could be brought out. Of this we have no knowledge, but at least the opportunity should have been open to the accused and his counsel.

But the Circuit Court did not merely stop with receiving local board memoranda for the first time on appeal. It did not give counsel for the defense the opportunity to be heard or argue the case. We submit that this is erroneous appellate procedure and that a hearing should be granted so that it may be determined for all the circuits what is the correct procedure under the circumstances.

We are not alone in being affected by such procedural conduct which, without notice and an opportunity to be heard, violates the fundamental principles of due process of law. As said in *McVeigh* v. *U. S.*, 11 Wall. 259, "The order in effect denied the respondent a hearing." And in *Windsor* v. *McVeigh*, 93 U. S. 274, Mr. Justice Field said, page 277, "Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of

affording the party an opportunity of being heard upon the claim or charges made." The court then goes on to say that in the case where you have been instructed to appear and be heard and the court says "your appearance shall not be recognized and you shall not be heard" results in a decree which is "in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

If one is thus called upon to defend his rights for the first time in a circuit court of appeals and is given no opportunity to be heard or to present matters contrary to those presented in that court, he is denied the first and most fundamental principle of due process of law guaranteed by our 5th Amendment to the Constitution of the U. S., which applies to all officers of the government whether executive, legislative or judicial against action which is arbitrary or capricious.

It is just as fundamental that the procedure in the circuit court of appeals shall only be decided upon full opportunity to be heard. This is one of the inexorable safeguards of justice.

As said by Mr. Chief Justice Hughes in *Morgan* v. *U. S.*, 304 U. S. 1, 18, 19, "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." It may be pointed out that the memoranda to State Directors of Selective Service are not published in the Federal Register and are not available or open to counsel and can only be brought out by defendants through interrogation of witnesses.

II

In its first decision the circuit court of appeals recognized the fact that Sartor, having been only inducted into the Army, was no longer within the jurisdiction of the Selective Service Board for the purposes of any furlough.

As a matter of fact, we think the record amply demonstrates that petitioner Cohen was in no different position in respect to a request to him for a letter than any friend, employer or relative or private person from whom the army is constantly requesting information as to the needs for a person. The government contended, however, in its brief in opposition that "we submit that in the light of the relationship that exists between the Selective Service System and the armed forces" * * * "that section 117 of the Criminal Code, was violated even if, strictly speaking, the functions performed by the Selective Service System in relation to post-induction furloughs *are beyond its authority*" (Page 10 respondent's brief).

We think this is tantamount to an admission that there was no valid authority for Cohen's conviction.

There is no rule so uniformly adhered to by the courts, both State and Federal, as the one that there can be no crime of bribery unless the law requires and imposes upon a person the duty of acting under the particular situation. *Thomson* v. *U. S.*, 37, App. D. C. 461.

The offense of bribery must be to influence *official conduct*. *Sharp* v. *U. S.*, 139 Fed. 878. *Rembrad* v. *U. S.*, 281 Fed. 122. *U. S.* v. *Rosenthal*, 126 Fed. 766.

Nothing further is more strictly established than before one can be convicted there must be a commission or omission of an act defined by statute. *Viereck* v. *U. S.*, 318 U. S. 236, 241, "and then only if punishment is authorized by Congress"—The distinction is between the court and its judicial power.

The trouble with the respondent is that it would turn the continuous process for the selection of men for national service into reverse gear and make it go backwards. We do not believe that this is permitted, that once the inductee is in the service the Army regulations governing furloughs are controlled exclusively. Of course, a general or colonel is not stopped from making inquiries from any source and the mere fact that he does so does not place the person requested as acting in an official capacity. There is nothing in regulations, promulgated or otherwise, that give further authority.

The respondent in its brief before this court, as in the circuit court of appeals, relied upon local board memoranda (respondent's brief 12), for support to sustain the judgment below. The jury did not have the benefit of this memoranda, and neither did the defendant, at the time of trial, nor on appeal were any rights accorded with respect to examination or cross-examination. The government argued that at least Cohen was acting "de facto" (Respondent's brief 13).

The respondent says, "Even if it were thought that functions relating to Sartor's furlough were beyond the regular authority of the local board and of Cohen, the offense would be made out because it is sufficient if the official acted under color of authority, at least if he was a de jure officer, occupying at the time a lawful office.

We think this is a further concession that Cohen was not acting in an official capacity, which gives the court legal authority and we further think the respondent's argument as to "color of authority" is a mistaken view of his position.

A color of authority exists when a man, believing he has the right to an office or believing that he has a right to perform the duties of an office acts in that capacity when he may not have been actually elected or properly selected.

It does not exist where a man has a lawful office but does something which is not within the scope of his duties as defined by statute and regulations.

III

The government contends that the admission in evidence of Schnee after his arrest did not render inadmissible against him and Cohen the statement which he made to the F. B. I. This view it takes because Schnee, when interviewed, did not regard the conspiracy as being at an end (Respondent's brief 17).

The test, however, is not what Schnee thought or what the F. B. I. thought but what actually occurred. And it has been uniformly held that the arrest of a person on the charge of conspiracy terminates the conspiracy and statements made thereafter may not be used in brief and in furtherance of conspiracy. To this argument, the respondent says that no one had told Schnee he was under arrest, which results in a question as to what constitutes an arrest. We think that the circumstances revealed by the record show that Schnee was taken into Custody and that his own attorney was not permitted to contact him (Respondent's brief 271, 273). If a man is so detained that his own lawyer can't get in touch with him he certainly is under arrest. The use of the statements thereafter obtained was, we submit, prejudicial error.

For each of the above reasons the petitioner prays that this Honorable Court grant a re-hearing and reverse the judgment below.

Respectfully submitted,

MORRIS LAVINE.

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